

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CACR 06-173

March 14, 2007

EFRAIN VIVEROS
APPELLANT

AN APPEAL FROM CRAWFORD
COUNTY CIRCUIT COURT
[CR-203-379-B]

V.

HON. GARY COTTRELL, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Efrain Viveros appeals from his convictions for possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and two counts of failure to appear. He argues that the State failed to prove he received notice of two hearings in this case. He also appeals from the denial of his motion to suppress evidence of drugs seized during a traffic stop, arguing that the officer lacked reasonable suspicion to continue the detention after a warning citation was issued. We affirm the convictions for failure to appear because Viveros had actual knowledge of the hearings, and we affirm the denial of his motion to suppress because the continued detention was proper.

Viveros was a passenger in a van with a California license plate that was traveling on Interstate 40 in western Arkansas. The van was not owned by Viveros and was driven by Carlos Cortez. At 11:40 p.m. on August 20, 2003, Officer Mike Bowman, a Van Buren police officer, stopped the van for not having a license plate light. Bowman showed Cortez why he was stopped and requested identification from him. After Cortez indicated that the vehicle belonged to Viveros, Bowman also requested Viveros's identification. It appeared

to Bowman that Cortez attempted to prevent the officer from viewing the interior of the van. Neither man produced a driver's license but each provided other identifying information. The men did not present proof of current insurance, and the vehicle was not registered to either man.

Bowman returned to his vehicle, accompanied by Cortez, and relayed the information given to him to the dispatcher. While waiting on the dispatcher to check the information, Bowman then asked routine questions, such as where the parties were headed and the identity of the passenger. Cortez was unable to state where they were headed; he referred to Viveros as his uncle. At 11:46 p.m., the dispatcher informed Bowman that Cortez's driver's license was suspended and told Bowman to stand by for the reason. During this time, Bowman clarified Viveros's birthday for the dispatcher. At 11:48 p.m., while still waiting on the reason for the suspension of Cortez's license, Bowman issued the warning citation to Cortez for driving with no tag light.

Upon further questioning, Cortez told Bowman that the vehicle belonged to Viveros's brother. Bowman returned to the passenger side of the van to question Viveros, who indicated that they were going to Rogers and pointed northward; he also stated that they were going to a place one hour north of the university (at Fayetteville). However, he identified Cortez as a friend of his cousin. At this point, approximately 11:51 p.m., dispatch informed Bowman that Cortez's driver's license was suspended for failure to appear in California.

At 11:53 p.m., while still waiting to see whether Viveros had a valid driver's license, Bowman requested Cortez's consent to search the vehicle, which Cortez orally granted. Immediately thereafter, dispatch notified Bowman that Viveros had a "590," which Bowman explained at the suppression hearing is a prior drug conviction. While waiting on descriptors to further verify that the "590" offender was actually appellant, Cortez signed the consent form. At 11:56 p.m., Bowman requested the social security number of the "590" offender,

which he thereafter verified with Viveros was his.

After doing so, at 11:57 p.m., Bowman requested Viveros's consent to search, which Viveros granted. Viveros and Cortez waited at the rear of the van while Bowman searched the van. The videotape of the stop stopped at 11:59 p.m., which, according to Bowman, was approximately thirty seconds before he found the drugs. The search of the van revealed two bricks of what was later determined to be a total of 852.6 grams of methamphetamine/dimethyl sulfone mixture (approximately 1.9 pounds).

Viveros was charged with possession of methamphetamine with intent to deliver and possession of drug paraphernalia. He subsequently filed a motion to suppress, challenging the legality of the search. At the suppression hearing, Viveros reaffirmed that he challenged the search as "an illegal search beyond constitutional grounds." He also claimed responsibility for the van but disclaimed responsibility for its contents, except for his clothes. The trial court determined that Cortez and Viveros each gave valid consent, although it determined that Viveros's consent was unnecessary. The trial court denied Viveros's motion to suppress, noting that Viveros lacked standing to challenge the search, but it also denied the motion on the merits as if Viveros had standing.

The court concluded that the continued detention was proper because Bowman could not determine why Cortez's license was suspended within the fifteen-minute reasonable-detention period authorized under Arkansas Rule of Criminal Procedure 3.1. The court noted that Bowman was notified that Cortez was driving on a suspended license, that neither person in the vehicle owned it, that Cortez and Viveros provided conflicting information as to their relationship, the information regarding their destination and who they were going to visit was questionable, and that Viveros had a prior drug arrest. Further, the court noted that the driver of the vehicle gave valid consent to search the vehicle before the fifteen-minute period under Rule 3.1 expired. Therefore, the trial court denied Viveros's motion to suppress.

Viveros failed to appear at a pre-trial mandatory hearing scheduled for June 7, 2004. He also failed to appear for his jury trial, scheduled for December 9, 2004. Ultimately, Viveros was tried by a jury and convicted of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and two counts of failure to appear. He was sentenced to serve eighty years for possession with intent to deliver methamphetamine, ten years for possession of drug paraphernalia, and ten years each on the failure-to-appear charges. Because his sentences are to run consecutively, his total sentence is 110 years in prison.

I. Failure to Appear

Viveros challenges the sufficiency of the evidence supporting his convictions for failure to appear. The relevant statute provides that a person commits the offense of failure to appear if he fails to appear without reasonable excuse subsequent to having been lawfully set at liberty upon condition that he or she appear at a specified time, place, and court. Ark. Code Ann. § 5-54-120 (Repl. 2005).

At trial, the State offered proof that Viveros failed to appear on June 7, 2004, for a mandatory hearing, and on December 9, 2004, for his jury trial. Elizabeth Joslin, Crawford County deputy circuit clerk and custodian of records, testified that her records reflected that Viveros failed to appear on both dates.

Viveros initially challenged only the evidence supporting the failure-to-appear charge related to the June 7, 2004 mandatory hearing, arguing that a mandatory appearance is not an appearance for which a defendant can be charged with failure to appear because it is a hearing required by local rules, not by the Arkansas Rules of Criminal Procedure. The trial court denied that motion.

After Viveros testified, the defense rested. Viveros then requested dismissal of both failure-to-appear charges, renewed his motion to dismiss, and raised a different ground for

dismissal: that the State failed to prove he had actual notice that he was required to appear. When questioned by the trial court whether he had changed his argument, Viveros's counsel replied, "I have added to it." The court denied the motion.

The State incorrectly argues that because Viveros failed to originally inform the trial court of any specific element missing from its case, his attempt to thereafter "renew" the motion does not preserve his challenge to the sufficiency of the evidence for appellate review. We take Viveros's argument to mean that a mandatory appearance as required under the local rules is not a "specified time, place, and court" referred to in § 5-54-120. Thus, his argument on renewal is preserved because his original motion challenged a specific element of the State's case-in-chief. *See Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997)(addressing on the merits an argument raised on renewal that was not raised in the original motion for a directed verdict).

Nonetheless, his statutory argument is unavailing. Viveros does not cite any persuasive authority to support his novel proposition that a mandatory appearance under local rules is somehow not mandatory unless it is also specifically referred to in the Arkansas Rules of Criminal Procedure. Further, Viveros should have raised his objection to the mandatory appearance no later than the date of the mandatory hearing itself, rather than simply not appearing at the mandatory hearing and thereafter raising the objection for the first time in a motion for a directed verdict during his criminal trial.

We affirm Viveros's convictions for failure to appear because he was required to appear at the mandatory hearing and the jury trial and had actual knowledge of both proceedings, yet failed to appear. During the June 7, 2004 proceedings, Viveros's attorney informed the court: "Your Honor, I have spoken with Efrain....In fact, I speak with his cousin, who translates for him. He is supposed to be here and knows of his hearing." Because Viveros is bound by his attorney's actions in the open-court, on-the-record exchange

between the court and the attorney, he cannot now claim that he did not have notice of the June 7, 2004 hearing. *See Johnson v. State*, 314 Ark. 471, 868 S.W.2d 42 (1993); *Harris v. State*, 6 Ark. App. 89, 638 S.W.2d 698 (1982).

Moreover, Viveros admitted at trial that he was notified of the December 9, 2004 hearing. Because Viveros had actual notice of both hearings, we affirm his convictions for failure to appear.

II. Motion to Suppress

Viveros also argues that the trial court erred in denying his motion to suppress the evidence seized pursuant to the search of the van. The trial court ruled that Viveros had no standing to challenge the search but nonetheless also ruled, on the merits, that the officer had reasonable grounds to detain Cortez and Viveros after the officer issued the traffic citation. We agree.

In reviewing a circuit court's denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances. *See Hamilton v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 20, 2006). We review findings of historical facts for clear error, and we determine whether those facts give rise to reasonable suspicion or probable cause, giving considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and deferring to the superior position of the trial judge to pass upon the credibility of witnesses. *Id.*

The trial court based its ruling on the merits on the reasonableness of the detention under Rule 3.1. Even if Viveros does not have standing to contest the search, he has standing to contest the initial detention of his person. *See State v. Bowers*, 334 Ark. 447, 976 S.W.2d 379 (1998). Further, if the initial detention was improper, then the subsequent consent to search was tainted by the initial illegality and the evidence seized pursuant to that search was illegally obtained. *See id.* Rule 3.1 provides:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony ... if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

As part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and writing a citation or warning. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. *Id.* However, after those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). Further, after-acquired knowledge is irrelevant to the analysis of whether the officer had reasonable suspicion to conduct investigative detention; only what the officer knew at the time of the detention enters the analysis. *Laime, supra*.

The officer here had reasonable suspicion to detain Viveros after the citation was issued. Even though the initial reason for the traffic stop ended at 11:48 p.m., when the citation was issued, other issues came to light *before* the traffic stop ended that required further investigation – issues, which, through no fault of the officer, were not resolved before the citation was issued. When the citation was issued, the officer knew that Cortez's driver's license was suspended but had not yet been informed as to the reason; nor did the officer know at that point whether Viveros would be able to drive the van should it be released.

These facts, combined with the officer's observations that Cortez attempted to shield the interior of the van from the officer's view, plus the inconsistencies in the men's stories regarding who owned the vehicle, their relationship to each other, and where they were heading, gave the officer ample reason to continue the detention. Further, Officer Bowman obtained valid consent to search the van *before* the fifteen-minute time limit under Rule 3.1 expired, and *while* he was attempting to ascertain the reason for Cortez's license suspension and to verify whether Viveros would be allowed to drive the van. Accordingly, the trial court did not err in denying Viveros's motion to suppress.

Affirmed.

PITTMAN, C.J., and VAUGHT, J. agree.